95-1728

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JANETTE LOHMAN, THE MISSOURI DEPARTMENT OF REVENUE AND THE STATE OF MISSOURI,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. McADAMS
Counsel of Record
ALANA M. BARRAGÁN-SCOTT
C. GAIL VASTERLING
Assistant Attorneys General
Post Office Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321

ATTORNEYS FOR PETITIONERS

69 pp.

QUESTIONS PRESENTED

1. Does federal sovereign tax immunity supplant Missouri's sovereign right to raise revenue by imposing a sales tax on the transfer of electricity to a federal contractor that orders, uses, is billed for, and, with its own funds, pays for the electricity?

2. Does the legal incidence of a state sales tax fall on a purchaser claiming federal sovereign tax immunity when the state's taxing statute does not require a purchaser to pay the tax?

LIST OF PARTIES

The defendants-appellants to the proceedings below were the petitioners State of Missouri, the Missouri Department of Revenue, and the Director of the Missouri Department of Revenue. The office of director is now held by Janette Lohman, and she has been listed as a petitioner. Rule 35.3. The United States of America was the plaintiff-appellee below and is the respondent herein. Kansas City Power and Light Company was named as a defendant before the district court, but did not participate in the appeal of this matter.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

REASONS FOR GRANTING THE WRIT 10

I. The Eighth Circuit's holding, that federal sovereign tax immunity entirely supplants the states' sovereign right to raise revenue by imposing a sales tax on the transfer of electricity to a federal contractor which orders, uses, and, with its own funds, pays for the electricity, significantly disrupts the balance this Court has established between the interests of the states and those of the federal government. 11

II. The Eighth Circuit's opinion is an affront to state sovereignty because it determines that the legal incidence of a state's sales tax falls on a purchaser claiming federal sovereign

tax immunity even though the state taxing statute does not require the purchaser to pay the sales tax. 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Alabama v. King & Boozer.
314 U.S. 1 (1941) 12, 18-20

American Oil Co. v. Neill. 380 U.S. 451
(1965) 2, 24, 27

Diamond Nat'l Corp. v. State Bd. of Equalization.
425 U.S. 268 (1976) 24

Fabick and Co. v. Schaffner. 492 S.W.2d 737
(Mo. 1973) 23

Farm and Home Sav. Ass'n v. Spradling.
538 S.W.2d 313 (Mo. 1976) 23

First Agric. Nat'l Bank v. State Tax Comm'n.
392 U.S. 339 (1968) 13, 22, 24, 27

Gurley v. Rhoden. 421 U.S. 200 (1975) 26, 27

James v. Dravo Contracting Co., 302 U.S. 134
(1937) 22

Kern-Limerick Inc. v. Scurlock, 347 U.S. 110 (1954) . 20

Mayo v. U.S., 319 U.S. 441 (1943) 11

Michelin Tire Corp. v. Wages. 423 U.S. 276
(1976) 12

Panhandle Oil Co. v. Miss. ex rel. Knox.
277 U.S. 218 (1928) 26

State ex rel. Thompson-Sterns-Roger v. Schaffner. 489 S.W.2d 207 (Mo. 1973) 14

U.S. v. Benton. 772 F. Supp. 453 (W.D. Mo. 1990), *aff'd*. 975 F.2d 511 (8th Cir. 1992), *cert. granted and opinion vacated sub nom. U.S. v. Melcher*. 508 U.S. 957 (1993) and *rev'd sub nom. U.S. v. Lohman*. 21 F.3d 844 (8th Cir. 1994) 3, 10

U.S. v. Boyd, 378 U.S. 39 (1964) 22

U.S. v. District of Columbia. 669 F.2d 738 (D.C. Cir. 1981) 17, 18

U.S. v. Forst, 442 F. Supp. 920 (W.D. Va. 1977), *aff'd*. 569 F.2d 811 (4th Cir. 1978) 18

U.S. v. Maryland. 471 F. Supp. 1030 (D. Md. 1979) 22, 23

U.S. v. New Mexico. 455 U.S. 720 (1982) . 2, 11-13, 16, 17, 19, 20, 22, 23

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 1

28 U.S.C. § 1345 1

28 U.S.C. § 2201 1

Mo. Rev. Stat. § 144.010.1(8) 14

Mo. Rev. Stat. § 144.010.1(8)(b) 14

Mo. Rev. Stat. § 144.020.1 23

Mo. Rev. Stat. § 144.020.1(1) 13

Mo. Rev. Stat. § 144.020.1(3) 14

Mo. Rev. Stat. § 144.021 23

Mo. Rev. Stat. § 144.060 26

Mo. Rev. Stat. § 144.080.4 26

Mo. Rev. Stat. § 144.080.5 25

Mo. Rev. Stat. § 144.285 26

Mo. Rev. Stat. § 144.285.5 25

Mo. Rev. Stat. § 149.015.4 25

Other Authorities:

Mo. Code Regs. tit. 12, § 10-3.464(1) (1994) 26

Supremacy Clause, U.S. Const. Art. VI, cl. 2 22

The Federalist No. 32 (Alexander Hamilton)
(Clinton Rossiter ed., 1961) 12

Mo. Code Regs. tit. 12, § 10-3.464(1) (1994) 26

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Janette Lohman, the Director of the Missouri Department of Revenue; the Missouri Department of Revenue; and the State of Missouri respectfully pray that the Court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit in *United States of America v. Janette Lohman, Director of Revenue, State of Missouri; Missouri Department of Revenue; and State of Missouri*, No. 93-3303 (January 22, 1996).

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 74 F.3d 863 and reprinted in the Appendix ("App.") at A-1. The final order of the district court granting the injunctive relief requested by the United States is unreported and reprinted in the Appendix at A-14. The district court's order on the summary judgment motions is unreported and reprinted in the Appendix at A-19.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1345 and 2201, the respondent brought this suit in the United States District Court for the Western District of Missouri. On September 8, 1992, the district court granted respondent's motion for summary judgment, App. at A-19, and entered a judgment. App. at A-17. Missouri's appeal from the 1992 order was dismissed on the agreed motion of the parties for want of finality and the case was remanded for further proceedings. App. at A-16. The district court

entered final injunctive relief on July 12, 1993. App. at A-14.

On January 22, 1996, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court on alternative grounds. App. at A-1.

The jurisdiction of this court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the supremacy clause of the Constitution of the United States and parts of Chapter 144 of the Revised Statutes of Missouri. Those provisions are reprinted in the appendix beginning at A-25.

STATEMENT

This case concerns two rights of the fifty states: the right to tax sales to federal contractors that order, pay for, and use commodities to fulfill their federal contractual obligations; and the right to conclusively determine the legal incidence of their revenue laws when the states' constructions are reasonable. In its landmark opinion in *U.S. v. New Mexico*, 455 U.S. 720 (1982), this Court clarified and re-enshrined the right of the states to tax sales to federal contractors. Even earlier this Court determined that states were empowered to conclusively determine the legal incidence of state revenue laws when the states' interpretations are consistent with a reasonable statutory construction. *American Oil Co. v. Neill*, 380 U.S. 451 (1965). In this case the court of appeals radically departed from this Court's instructions on these important matters

and wounded the heart of the states' retained sovereign power.

The district court enjoined Missouri's taxation of electricity sold by Kansas City Power and Light Company ("KCPL"). The electricity is ordered, paid for, and used by Olin Corporation ("Olin") in its operation of the Lake City Army Ammunition Plant (the "Plant"). Olin operates the federally-owned Plant pursuant to a management and operation contract ("M & O Contract"), using the electricity to produce ammunition for delivery to the federal government and for sale to other entities. The district court found, at the federal government's behest, that Olin purchased the electricity and resold it to the federal government, thereby excluding such sales from tax pursuant to Missouri law. App. at A-23. The district court relied on the now discredited case of *U.S. v. Benton*, 772 F. Supp. 453 (W.D. Mo. 1990), *aff'd*. 975 F.2d 511 (8th Cir. 1992), *cert. granted and opinion vacated sub nom. U.S. v. Melcher*, 508 U.S. 957 (1993), and *rev'd sub nom. U.S. v. Lohman*, 21 F.3d 844 (8th Cir. 1994). App. at A-23.

The Eighth Circuit disagreed with the district court's conclusion that Olin purchased the electricity. Rather, the court of appeals found that the federal government was the purchaser of the electricity and then affirmed, holding that the legal incidence of Missouri's sales tax was laid on the purchaser of electricity. App. at A-13.

A. Army's Relationship with KCPL and Remington

The Plant, a federally-owned facility located in Independence, Missouri, which has been in operation since 1941. It is used principally to manufacture ammunition for small arms. On April 1, 1951, KCPL entered into a

Negotiated Electrical Services Contract ("Contract") with the United States Department of the Army. Under the Contract KCPL contracted to sell and deliver, and the Army agreed to purchase and receive, electrical power for the purpose of operating the Plant.

In July 1960, the federal government issued a letter to Remington Arms Company ("Remington"), the then-operator of the Plant, referencing the "Procedure Covering *Purchases* by CPFF Contractors [Plant operators] Under Indefinite Delivery Type Contracts Negotiated by Governmental Agencies." Emphasis added. The federal government advised Remington that a method of "direct ordering and direct payment" by Remington for commodities, including electricity, would alleviate problems for the federal government.

This new procedure was applicable to other contract operators of government-owned facilities across the nation. Operators at various government installations, including the Plant, would order and directly pay for electrical services. The objective of the procedure was the elimination of any need for the federal government to issue purchase orders and "pay the [electrical services] vendor by U.S. Treasury check." The government recognized that the revised purchasing procedure would lead to additional state taxation:

> In certain instances it is possible that the Government will suffer tax disadvantages as a result of this revised procedure. The procedure has been adopted with due advertence to this fact on the basis that the overall savings possible thereby will more than offset any possible cost increases resulting from taxes.

On August 10, 1960, Remington issued its own purchase order (not an Army purchase order) for electricity, which KCPL accepted. Thereafter, Remington ordered, used and paid for the electricity delivered to the Plant. Additionally, Remington claimed a sales tax exemption for the electricity delivered to the Plant. The exemption letter, sent to KCPL, discusses "purchases" made by Remington.

In April 1962, the federal government and KCPL formalized the arrangement established by the government's previously-issued procedure and modified the Contract. According to this modification, the parties agreed that so long as the Plant was managed by an operator, the operator could purchase electricity "to the same extent" that the federal government had done so. The modification provided:

> orders for services under this contract may be placed with [KCPL] by such [operator] and will be honored to the same extent as will orders placed by the Government . . . . Furthermore, during such period of time [KCPL] agrees that placing of such orders, and payment thereof by such [operator], will satisfy the requirements of this contract concerning minimum monthly accounts to be ordered and paid for by the Government.

Since April 3, 1962, the checks, drafts or money orders used to pay for electricity delivered to the Plant have been issued or drawn on the accounts of Remington or Olin, the Plant's operators.

Under the Contract, the federal government agreed that electrical service furnished would be subject to regulation by the state regulatory commission. The

government agreed to pay those rates established by the commission. The bills submitted for electricity delivered to the Plant are submitted under Rate Schedule PL, which is approved by the Missouri Public Service Commission. Following the decision of the United States to have the operators of the Plant order and pay for electricity, Rate Schedule PL was modified to provide: "Tax Schedule TA shall be applicable to all customer billings under this schedule." Tax Schedule TA, not surprisingly, provides for tax collection:

> There shall be added to the monthly bill of a customer, as separate items, a surcharge equal to the proportionate part of any license, occupation, or other similar fee or tax applicable to electric service by the Company [KCPL] to the customer, which fee or tax is imposed upon the Company by taxing authorities on the basis of the gross receipts, net receipts, or revenues from electrical sales by the Company.

Pursuant to this Schedule, Olin has paid local gross receipts taxes imposed on the electricity delivered to the Plant and the federal government has reimbursed Olin for those tax payments.

B. Olin's Relationship with the Army and KCPL

Olin succeeded Remington as the operator of the Plant. On July 2, 1985, Olin entered into the M&O Contract with the Department of the Army to operate and maintain the Plant. This contract required Olin to become fully responsible for the operation and maintenance of the Plant. The M&O Contract provided that Olin, as an

independent contractor and not as a government agent, would furnish all the equipment, supplies and material necessary to operate the Plant except those "furnished by the Government." Olin, and Remington before it, requested reimbursement for payments made to KCPL for electrical services on a form labeled "Public Voucher for Purchases and Services Other than Personnel." The contract operators of the Plant have been reimbursed in full by the federal government for all amounts they have paid to KCPL for electrical services. The federal government does not reimburse Olin for its acquisition of government-furnished material. Hence, the electricity is, by definition, not government-furnished material.

Neither the district court nor the court of appeals found that Olin was anything other than what it claims to be: an independent contractor. It is not the government's purchasing agent, nor one of its constituent parts. Olin is a private, for profit, business corporation. Olin is neither a federal instrumentality nor the federal government's disbursing officer. Olin is contractually obligated to pay KCPL's bills for electrical service, and KCPL has made a demand on Olin for sales taxes due. Neither Remington nor Olin exercised dominion over federal funds when they issued checks to KCPL for electrical services, and the federal government is not a signatory on the accounts used by the contract operators to pay KCPL for electrical services. The monies delivered by the Plant's contract operators were private corporate funds, not federal government funds. The federal government has no ownership interest in Olin, and the congruence of professional interest between the two is not complete. The federal contractors were not required to secure the federal government's specific approval for their payments of electrical services.

Furthermore on May 8, 1986, Olin issued a purchase order for electricity to be delivered to the Plant. The M&O Contract does not require the contract operator of the Plant to issue a purchase order for electricity. As a result of Olin's purchase order, KCPL's invoices were subsequently directed to "Olin Corp." as the "Customer" and reference the M&O Contract number and Olin's purchase order number, not the number of the federal government's contract with KCPL. The purchase order indicates that the buyer *or* the U.S. government can terminate the purchase order upon thirty-day written notice. The word "buyer" in Olin's purchase order refers to Olin. Olin assigned a rating on the purchase order it sent to KCPL. This rating, DO-C-3, is to be used by operators such as Olin "for the *purchase* of maintenance, repair, and operating supplies and installation material for production equipment." Emphasis added. The M&O Contract requires the government to reimburse Olin for moneys paid in state taxes unless an exemption is available to Olin.

C. Olin's Use of Electricity

The electricity delivered to the Plant is used in the manufacture of small-arms ammunitions, for related support and administrative functions, and by Plant housing. These physical activities, which use and consume the electricity at the Plant, are performed by Olin. Olin orders the electricity delivered to the Plant; even if Olin's purchase order were ignored, the order occurs and delivery is accomplished when Olin flips the switch completing the circuit using electrical power. The electricity is used instantly when it is delivered.

Olin controls the Plant equipment and facilities that consume electricity, turning on and off the electricity on a day-to-day basis. In doing so Olin not only orders and uses

the electricity, it also fulfills its obligation under the M&O Contract to economically manage its use. To maximize energy conservation and minimize energy consumption, Olin has reduced lighting levels and taken other steps that do not require the federal government's approval. Olin has created an energy awareness program to encourage the conservation of energy and created energy conservation teams to coordinate energy conservation efforts. No government employees are on these conservation teams.

Olin has two important interests in reducing peak demand charges for electricity: cost reduction and energy conservation. Olin has been successful in its conservation activities at the Plant and has received federal energy awards. For the purpose of determining any award fee under the M&O Contract, Olin is evaluated on energy consumption and energy conservation.

D. The Audit

In connection with a 1986-1988 audit of KCPL, the Department of Revenue assessed KCPL $737,893.68, which KCPL paid under protest. Of this assessment, $561,413.07 represented sales tax, interest, and penalties on sales from January 1986 - December 1988 of electrical power by KCPL delivered to Olin for use at the Plant.[1]

---

[1] During the audit, the Department of Revenue discovered that the federal government had submitted tax exemption certificates (issued to the Army by the Missouri Department of Revenue) to KCPL. These exemption certificates, covering electricity delivered to the Plant, provide that exempt purchases must be paid for by check or draft drawn on funds of the Department of the Army and that the exemption was not assignable or transferable. But the monies to pay for electricity delivered to the Plant were funds belonging to Olin. The federal government has not denied this misuse of the exemption certificates issued by Missouri.

Petitioners now seek review of the appellate court's decision prohibiting Missouri from taxing KCPL's sales to Olin, the federal contractor who ordered, used, and paid for the electricity. Petitioners also seek review of the appellate court's decision that the legal incidence of Missouri's tax is on the purchaser because Missouri's taxing statute permits the seller to absorb the tax as a cost of doing business.

REASONS FOR GRANTING THE WRIT

Before the Court is a case of extraordinary importance to the fifty states. It directly and negatively impacts their sovereign right to raise revenues and, thus, interferes with their ability to provide an effective balance to the exercise of federal power. This is the second in a series of cases to reach this Court in which the federal government has attempted to interfere with Missouri's power to raise revenue.[2] The Eighth Circuit decided that federal sovereign tax immunity prevented Missouri from imposing a sales tax on the seller of electricity that is delivered to a federal contractor even though that contractor ordered, used, and, with its own funds, paid for the electricity. Additionally, the Eighth Circuit labeled "unreasonable" the decisions of the Missouri Supreme Court construing the statute as one placing the legal incidence of the tax on the seller, despite the consistency of Missouri's construction with this Court's rulings on the issue. These conclusions conflict with the prior decisions of this Court and will confuse other circuit courts in applying the Court's precedents. Furthermore, the questions presented in this petition raise significant questions going to the core of

---

[2] *U.S. v. Benton*, 772 F. Supp. 453 (W.D. Mo. 1990), *aff'd*, 975 F.2d 511 (8th Cir. 1992), *cert. granted and opinion vacated sub nom. U.S. v. Melcher*, 508 U.S. 957 (1993) and *rev'd sub nom. U.S. v. Lohman*, 21 F.3d 844 (8th Cir. 1994).

federal/state relations. Only this Court can now restore the necessary and constitutionally-enshrined balance of power between the sovereign parties to this case.

I. The Eighth Circuit's holding, that federal sovereign tax immunity entirely supplants the states' sovereign right to raise revenue by imposing a sales tax on the transfer of electricity to a federal contractor which orders, uses, and, with its own funds, pays for the electricity, significantly disrupts the balance this Court has established between the interests of the states and those of the federal government.

There is but "one constant" in the field of federal sovereign tax immunity: "a State may not, consistent with the Supremacy Clause. . . , lay a tax 'directly upon the United States.'" *U.S. v. New Mexico*, 455 U.S. 720, 733 (1982), *quoting Mayo v. U.S.*, 319 U.S. 441, 447 (1943). The Eighth Circuit has interpreted that "constant" so broadly that it obliterates another principle established in *New Mexico*: the need to preserve our federal system's "competing constitutional imperatives, by giving full range to each sovereign's taxing authority." *New Mexico*, 455 U.S. at 735-36. This Court should review this case to eliminate the considerable confusion caused by the Eighth Circuit's reluctance to apply this Court's precedents and the Eighth Circuit's implicit endorsement of the notion that the fifty states' taxing power is but a nuisance that is easily turned aside by the government's mere assertion of federal sovereign tax immunity on behalf of its contractors. Private operators of federal installations throughout the nation order, use, and pay for commodities. Pursuant to the Eighth Circuit's opinion, all may now claim the benefits of federal sovereign tax immunity if the federal government

ever had any involvement in selecting the seller of the commodity.

The inherent incongruity of allowing one sovereign to interfere with another's revenue collection has long been apparent to those sensitive to our nation's federal system. Alexander Hamilton commented favorably on the Constitution's intolerance for federal efforts to interfere with state revenue collection systems:

> [A]n attempt on the part of the national government to abridge them [the States] in the exercise of it [their independence and uncontrollable authority to raise their own revenues] would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

The Federalist No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Eighth Circuit's opinion evidences no concern for its "violent assumption of power," utterly fails to regard the fifty states' retained sovereign right to raise revenues and misses the entire tenor of current tax immunity law. This deficiency is apparent in the appellate opinion when it declares that *New Mexico* and *Alabama v. King & Boozer*, 314 U.S. 1 (1941) "do not require the denial of immunity here." App. at A-10.

Federal immunity from taxation is the exception, not the rule, when a state seeks to impose a sales tax on a private company. The rule articulated by this Court is that a state's power to tax can be denied only with "the clearest constitutional mandate." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 (1976). Until the Eighth Circuit ruled, there were two clear requirements antecedent to a finding of federal sovereign tax immunity: the federal government had

to be the purchaser of the property taxed, and the legal incidence of the state's tax had to fall on the purchaser. *New Mexico*, 455 U.S. at 742-43 and *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347 (1968). The Eighth Circuit has adopted a reading of those requirements that will, if left uncorrected, erode the power of the states to raise revenues and diminish their ability to act as an effective balance to federal power.

With due regard to the sovereign rights of both the federal government and the State of Missouri, the demands of dual sovereignty in our federal system require that a court first examine a state's taxing statute to determine what activity the state proposes to tax.[3] Upon each act of making a retail sale of tangible personal property within the state, Missouri imposes a tax of four percent of the purchase price or other consideration paid or charged. Mo. Rev. Stat. § 144.020.1(1) (1994).[4] A retail sale is defined by reference to a change in "ownership."

> Any transfer made by any person engaged in business . . . of the ownership of, or title to, tangible personal property to the purchaser for use or consumption and not for resale . . . for a valuable consideration.

---

[3] This Court observed that it is the activity being taxed that drives tax immunity analysis. "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as *the activity being taxed* is concerned." *New Mexico*, 455 U.S. at 735 (emphasis added).

[4] All references to Missouri statutory materials will be to the 1994 statutes unless otherwise noted.

Mo. Rev. Stat. § 144.010.1(8) (Supp. 1995). Ownership includes the exercise of dominion or control over the property transferred. *State ex rel. Thompson-Sterns-Roger v. Schaffner*, 489 S.W.2d 207, 215 (Mo. 1973). Sales at retail specifically include "sales of electricity [or] electrical current . . . to domestic, commercial or industrial *consumers*." Mo. Rev. Stat. § 144.010.1(8)(b) (emphasis added). Furthermore, Mo. Rev. Stat. § 144.020.1(3) specifically imposes a sales tax on transfers of electricity or electrical current to commercial or industrial consumers.

Pursuant to this statutory scheme Missouri, like many other states, imposes its sales tax on the seller of property who transfers the control of that property to another for use or consumption for a valuable consideration. Under the facts of this case, Missouri does not impose a tax directly on the federal government. KCPL is the seller of the electricity and Olin accepts control of it, uses it, and pays KCPL for it.

To reach its veiled conclusion, that Missouri is attempting to "rummage through the federal pocketbook" (App. at A-13), the Eighth Circuit begins its discussion not with an examination of Missouri's tax law or its applicability to Olin's behavior, but with an analysis of the activities undertaken by the federal government. Contrary to the decision of the lower court, the court of appeals concludes that the federal government is the purchaser of the electricity delivered to the Plant because, when it long ago negotiated a requirements contract for the delivery of electricity to the Plant, it secured a rate and a vendor, and because it remains ultimately liable on the sale of

electricity.[5] However, none of these events constitute a taxable activity under the law of Missouri or most other states.

A brief examination of the contractual relationship between the parties is revealing. There is little remaining of the 1951 Contract. Originally the Contract provided that the federal government would "purchase and receive" the electricity. In 1962 the federal government and KCPL modified the Contract to reflect the government's earlier issued, nation-wide policy changing the identity of the party performing the acts of purchase. The modification obligates KCPL to sell electricity to private companies in lieu of sales to the federal government.

> Orders for service under this Contract may be placed with [KCPL] by the [operators of the Plant] and will be honored to the same extent as will orders placed by the Government . . . . Furthermore, . . . [KCPL] agrees that placing of such orders, and payment thereof by such [operators], will satisfy the requirements of the contract concerning minimum monthly amounts to be ordered and paid by the Government.

The federal government referred to the activities of the operators as "purchases" of electricity. Following the Contract modification the operators of the Plant, including Olin, performed the acts of purchase -- they ordered the electricity and they paid for it.

---

[5] In reality there is no special rate. Rather, the federal government has agreed to pay whatever rate the Missouri Public Service Commission authorized KCPL to charge for large commercial users in KCPL's service area.

In an unprecedented departure from this Court's jurisprudence, the Eighth Circuit found these purchases made by a private contractor with its own funds cloaked with the federal government's tax immunity, despite the fact that the private contractor is "sufficiently distinct from" the federal government and is not the government's agent. *See New Mexico*, 455 U.S. at 743. The sales in *New Mexico* were subject to sales tax even though "only federal funds" were expended when the private contractors made the purchases. 455 U.S. at 726. Olin expended only private funds. Further, to be entitled to the government's tax immunity, a private contractor must actually stand in the federal government's shoes and have become so assimilated by the federal government as to have become one of its constituent parts. *Id.* at 736. Here the federal government has admitted that Olin did not meet this test.

Ignoring the considerations set forth by this Court in *New Mexico*, the Eighth Circuit has announced a new constitutional rule: that state taxes are impermissible if the federal government might ultimately be required to pay for a product purchased by a contractor. The Eighth Circuit's new rule allowed it to jump over the litany of factors that were critical under the *New Mexico* analysis; that Olin is a private, for-profit, business corporation and an independent contractor, not the government's purchasing agent, instrumentality, disbursing officer or one of its constituent parts. The Eighth Circuit instead found it important only that "the terms of the supplemental agreement do not unconditionally discharge the federal government from its obligations." App. at A-12. This result-driven rule is not found in this Court's jurisprudence nor is it supported by the purposes underlying federal sovereign tax immunity. Even in *New Mexico*, where the federal government was directly liable to the vendors, that fact did not persuade this Court to find immunity. Rather, as the operators were also

"presumably" liable to the vendors, this Court found immunity inappropriate. 455 U.S. at 743. The Eighth Circuit turns that holding on its head and only action by this Court can upright it.

The only other circuit to approach this issue had a significantly different understanding of the constitutional rule. The United States Court of Appeals for the District of Columbia Circuit spoke to the issue in *United States v. District of Columbia*. 669 F.2d 738 (D.C. Cir. 1981). There a federal employee selected and negotiated with a hotel to provide conference facilities for a federal conference and agreed to the dates and prices. This was similar to the effect of the federal government's contract with KCPL; it identified the vendor and established the pricing mechanism. Thereafter, in *District of Columbia*, the federal government hired a conference manager to organize the conference. This manager entered into an agreement with the hotel for the conference, similar to Olin's purchase order issued to KCPL. Just as Olin pays KCPL and is reimbursed, the manager paid the charges for the conference and was later reimbursed by the government.

The District of Columbia district court granted the federal government's motion for summary judgment, as did the Eighth Circuit here, finding that the contractor was the government's agent and that the city was attempting to lay an unconstitutional tax directly upon the United States. 669 F.2d at 741. Writing for the court of appeals, Judge Ginsburg reversed, noting that "[p]recedent securely indicates that any municipality other than the District of Columbia could tax sales of this sort." *Id.* at 739. After synthesizing this Court's cases, the District of Columbia Circuit found that a federal contractor "qualifies as a purchaser subject to sales tax exactions" with but one exception: if the contractor is *"explicitly designated by the*

federal contract as an agent with authority to pledge the credit of the United States." *Id.* at 744 (emphasis in original). *See also U.S. v. Forst*, 442 F. Supp. 920 (W.D. Va. 1977), *aff'd*, 569 F.2d 811 (4th Cir. 1978) (the court held material procured by a government contractor subject to sales tax, despite the high degree of control the government maintained over the procurement, because the "key factor" is whose credit is bound up in the transaction).

In Olin's case, as that of most federal contractors, the Contract does not "explicitly" or otherwise allow Olin to "pledge the credit of the United States" when it purchases commodities. In the District of Columbia Circuit, that would be dispositive. A contractor operating a federal facility in the District of Columbia under a contract like Olin's could be charged sales tax on the transfer of electricity. But in the Eighth Circuit, Olin and other federal contractors are excused from that obligation.

The holdings of the District of Columbia and Fourth Circuits had their origin in *Alabama v. King & Boozer*, 314 U.S. 1 (1941). There this Court defined a purchaser as "the person who orders and pays for [goods] when the sale is for cash or who is legally obligated to pay for them if the sale is on credit." 314 U.S. at 10. There is no material dispute in the case at bar that Olin ordered and paid for the electricity. The Eighth Circuit finds this fact irrelevant, labeling Olin as the government's "paymaster." App. at A-10. The significance of this labeling is not disclosed in the appellate court's opinion nor is it disclosed in this Court's prior decisions in this area. The court of appeals cannot have overlooked the federal government's numerous admissions in this case that Olin is a private, for profit business corporation, not the government's purchasing agent or disbursing officer, and not a federal instrumentality or a

constituent part of the federal government. Hence, Olin meets the test for a cash purchaser under *King & Boozer*.

Even if KCPL's sales of electricity were considered on credit, Olin would meet this Court's test for a credit purchaser. The *King & Boozer* court determined that sales were for credit when the contractors were obligated to pay for the material purchased despite the fact that the government reserved the right "to pay directly . . . all sums due from the Contractor." *Id.* The federal government did not even reserve that right here; it transferred the obligation to pay for electricity to the Plant's operator, Olin, and Olin issued a purchase order and paid for the electricity.[6] Pursuant thereto, KCPL billed Olin for the electricity, labeling Olin as the customer, and received payment from Olin. Surely if this case involves a credit sale, Olin's credit

---

[6] The Eighth Circuit notes that the contractors in *New Mexico* and *King & Boozer*, "made purchases in their own names and had direct contractual liability to the vendors" (App. at A-10), and then concludes that Olin's purchase order does not perform this function. App. at A-4, A-10, nn.5, 6 and 9. The court concludes that Olin's purchase order is a mere procedural document, even though the contract documents make no mention of procedural purchase orders. App. at A-10. The court also says that the purchase order incorporates the 1951 Contract. App. at A-4. In reality Olin's purchase order specifically incorporates a contract bearing the date April 30, 1947. Confirming petitioners' assertion that this is a results-orientated decision, the court describes this as a typographical error (App. at A-4, n.5), despite evidence that the Army's contractual relationship with KCPL began in 1941 and the only witness to testify concerning a contract with the 1947 date professed an absence of knowledge on the subject. Missouri directed the district and circuit courts to these facts concerning the contested nature of the applicability of the 1951 Contract, but the court, affirming the entry of summary judgment, decided without discussion that this evidence was insufficient for a fact finder to conclude that Olin's purchase order worked a novation of an earlier contract.

stood behind the sale of the electricity just as the contractor's credit did in *King & Boozer*.

Thus, the Eighth Circuit's conclusion that the federal government is the purchaser of the electricity which Olin orders, uses and pays for is an unsupported and insupportable departure from this Court's precedents. The Eighth Circuit's conclusion appears to be premised on but one point; so long as the Contract between the federal government and KCPL remains in force, labeling the federal government the purchaser and establishing the pricing mechanism for the electricity delivered to the Plant, the government is the purchaser of the electricity regardless of the limited function the Contract performs. The resort to "wooden formalism" has been rejected by this Court, *New Mexico*, 455 U.S. at 737, and should have been rejected here. Missouri is constitutionally entitled to tax the seller of electricity delivered to a private corporation who orders, uses and pays for it.

The situation before the Court is similar to the study tours that are arranged by bar associations throughout the country. The bar associations contract with tour operators for the provision of a tour package available at a set price to members of the bar and their families. The tours are then ordered and paid for by the members of the bar. Under the Eighth Circuit's decision, if the bar association's and the tour operator's contract designates the bar association as the purchaser, that designation is inviolate. This is not an appropriate statement of the law.[7] It is the

---

[7] "We can not believe that an immunity of constitutional stature rests on . . . [an] approach [that] allows any government functionary to draw the constitutional line by changing a few words in a contract." *New Mexico*, 455 U.S. at 737, *quoting Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110, 126 (1954). Labeling is simply not dispositive in

bar member who orders and pays for the tour and is its purchaser. The bar association merely negotiated the contract which established the price for the purchases made by its members.

Similarly, the 1951 Contract now fulfills (if it has not been replaced with Olin's purchase order) only one function; it establishes the price, at the state-regulated rate, for the class of electricity which Olin purchases from the electrical utility in the area. The federal government's negotiation of a contract incorporating the state-approved rate for electrical service to be delivered to the Plant is simply insufficient to cloak Olin's order, use and payment for the electricity with federal sovereign tax immunity. Missouri does not tax what remains of the federal government's contractual relationship with KCPL. Rather, Missouri taxes, pursuant to its retained sovereign power, KCPL's transfer to Olin of electricity which Olin orders, uses and pays for.

The Eighth Circuit's decision is Alexander Hamilton's foretold event: a violent assumption of power on the part of the national government to abridge a state's exercise of its independence and authority to raise revenues, unwarranted by any article or clause of the Constitution.

II. The Eighth Circuit's opinion is an affront to state sovereignty because it determines that the legal incidence of a state's sales tax falls on a purchaser claiming federal sovereign tax immunity even though the state taxing statute does not require the purchaser to pay the sales tax.

---

identifying the purchaser. The issue is who performs the act of purchase.

This Court stated the test to determine, for federal sovereign tax immunity purposes, on whom the legal incidence of a state sales tax falls in terms that seemed, until now, to be eminently clear and concrete: "a sales tax which by its terms *must* be passed on to the purchaser imposes the legal incidence of the tax on the purchaser." *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347 (1968) (emphasis added). The Eighth Circuit has rejected this rule and substituted its own; deciding that the incidence of a state's sales tax falls on the purchaser even though the state's taxing statutes do not require that the tax be passed on to the purchaser.

There is no dispute that the Supremacy Clause, U.S. Const. Art. VI, cl. 2, prohibits a state from "directly" laying a tax on the United States. *New Mexico*, 455 U.S. at 733 (1982). However, the Constitution permits states to tax federal contractors even though the economic burden of the tax is borne by the United States. *U.S. v. Boyd*, 378 U.S. 39, 44 (1964).

Deciding upon whom the legal incidence of a tax is placed is an exacting activity. This Court has said that courts must observe

> close distinctions in order to maintain the essential freedom of government in performing its functions without unduly limiting the taxing power which is equally essential to both nation and state under our dual system.

James v. Dravo Contracting Co., 302 U.S. 134, 150 (1937). In fact, the inquiry is highly legalistic where small differences in two statutes can result, absent close analysis, in apparently inconsistent decisions. *U.S. v. Maryland*, 471

F. Supp. 1030, 1037 (D. Md. 1979). In *Maryland*, the court found the state's environmental surcharge did not constitute an unconstitutional levy on the federal government because the surcharge statute did not require that the charge be passed on to the consumer. *Id.* Like Missouri's sales tax statute, Maryland's statute provided that an inability on the seller's part to collect the surcharge did not diminish the seller's liability for the surcharge.

Missouri's taxing scheme is relatively straightforward. The tax is imposed on sellers for the privilege of engaging in the business of selling tangible personal property and certain services. Mo. Rev. Stat. § 144.020.1. The express purpose of Missouri's tax is to reach sellers, not purchasers:

> The purpose and intent [of the sales tax law] is to impose a tax upon the privilege of engaging in the business, in this state, of selling tangible personal property and [certain] services . . . .

Mo. Rev. Stat. § 144.021. These two sections reflect Missouri's intention that the legal incidence of its sales tax is to fall on the sellers of taxable property and Missouri courts have so held on repeated occasions. *Farm and Home Sav. Ass'n v. Spradling*, 538 S.W.2d 313, 316 (Mo. 1976); *Fabick and Co. v. Schaffner*, 492 S.W.2d 737 (Mo. 1973). Obviously, Missouri law permits the seller to pass on the economic incidence of its sales tax. But this Court has explicitly abandoned "the notion that the economic-as opposed to the legal-incidence of the tax is relevant" to tax immunity claims. *New Mexico*, 455 U.S. at 735 n.11.

Federal courts resolving questions of federal sovereign tax immunity from state taxation are not bound

by the state court's determination of where the legal incidence of tax falls. *Diamond Nat'l Corp. v. State Bd. of Equalization*, 425 U.S. 268, 269 (1976). "On the other hand, we are not free simply to disregard the state court's determination." *Id.* Rather, "[w]e give this finding great weight in determining the natural effect of the statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *American Oil Co. v. Neill*, 380 U.S. 451, 455-56 (1965).

The Eighth Circuit ignored this Court's admonition, determining that "the Missouri Courts' construction [is] inconsistent with the statutes' reasonable interpretation." App. at A-8. It did so without even referencing the key section of Missouri's statute, the one that makes passing on the sales tax elective. The Eighth Circuit looked not at Missouri law, but at the Massachusetts tax statute considered in *First Agric. Nat'l Bank*. Unfortunately, the court's comparison of the two statutes began and ended with their prohibitions on advertising. The court did not consider their differing treatments of the seller's obligation to pass on the sales tax.

Unlike the relevant Missouri statute, the Massachusetts statute provided that the tax

> shall be paid by the purchaser to the vendor and each vendor . . . *shall add to the sales price and shall collect from the purchaser the full amount of the tax* . . . and such tax shall be a debt from the purchaser to the vendor . . . .

392 U.S. at 347 (emphasis in original).

Missouri's taxing statute is quite different. It permits a seller to choose whether to separately identify the sales tax applicable to the transaction and, only when that is done, does the statute require the purchaser to pay the sales tax.

> Amounts which a vendor [seller] charges to and receives from the purchaser in accordance with this section shall not be includable in his gross receipts *if* the amounts are separately charged or stated.

Mo. Rev. Stat. § 144.285.5 (emphasis added).[8] The word "if," though small, is significant. It discloses the option of Missouri sellers to pass along the sales tax to the purchaser or consider the tax a cost of doing business.

A Missouri seller is directly prohibited from communicating to the purchaser that the tax "will not be separately stated and added to the selling price." Mo. Rev. Stat. § 144.080.5. If a seller were prohibited from absorbing sales tax as a cost of business, the statute would so indicate; all Missouri's statute prohibits is advertising to the purchaser the statutorily permissible failure to separately state the tax. Missouri's statute permits a seller to separately state and pass on the sales tax on the transaction to the purchaser. Conversely, the seller may decline to separately state the sales tax charge and make the duty to

---

[8] When Missouri wishes to pass the legal incidence of a tax to the buyer it does so in unmistakable language. Compare Mo. Rev. Stat. § 149.015.4, concerning cigarette taxes with Missouri's sales tax. The cigarette tax statute provides that the tax "shall . . . be added to the price of the cigarettes and recovered from the ultimate consumer or user with the person first selling the cigarettes acting as an agent of the state for the payment and collection of the tax to the state." No similar language appears in Missouri's sales tax statute.

pay the sales tax part of the seller's cost of doing business. This is what happens, for example, with sales of liquor by the drink. The state imposes a sales tax on each drink sold, but when the seller does not elect to separately state the sales tax charged for the drink, the seller must pay sales tax on his total receipts.[9]

The Eighth Circuit's decision, declaring that this taxing scheme places the legal incidence of the tax on the purchaser, implicitly resurrects the now-discredited decision of *Panhandle Oil Co. v. Miss. ex rel. Knox.* 277 U.S. 218 (1928). *Panhandle* found that taxes the state imposed on the seller of gasoline levied an unconstitutional tax on federal activities because the state taxed "the means used for the performance of federal functions." 277 U.S. at 221. The tax in *Panhandle* was objectionable to the majority because "the distributors were *able* to shift its burden to the purchaser." *Gurley v. Rhoden.* 421 U.S. 200, 210 (1975) (emphasis added). "The Court has since expressly

---

[9] The court of appeals makes much of the fact that a purchaser is required to pay the sales tax when it is passed on by the seller and that the seller "shall collect from the purchaser" the amount of the tax due, referencing Mo. Rev. Stat. §§ 144.060 and 144.080.4. However, reading these sections as part of the entire statute they can only be concerned with the purchaser's duty to pay the tax to the extent the seller elects to separately set it forth. Each of these sections specifically incorporate Mo. Rev. Stat. § 144.285, quoted in the text, which permits the election. Any confusion with regard to the seller's option to pass the sales tax on to the purchaser is readily resolved by reference to the pertinent regulation, Mo. Code Regs. tit. 12, § 10-3.464(1) (1994), which provides: "The sales tax collected by a seller from the purchaser may be deducted from the seller's gross receipts *if* those amounts are separately stated to the purchaser and added to the purchase price." Emphasis added. Missouri law simply does not require that the sales tax charged be passed on to the purchaser.

abandoned that view and has accepted the analysis of the dissent." *Id.*

Under this Court's current precedents, the legal incidence of a tax is upon the seller unless the taxing "statute required [the seller] to pass the tax on to the purchaser-consumer." *Id.* at 204. Missouri's taxing statute imposes no such requirement. Following *First Agric. Nat'l Bank* and *Gurley*, the legal incidence of Missouri's sales tax is on the seller -- not the purchaser. Hence, Missouri's sales tax is not laid directly on the federal government. Missouri reasonably, and thus conclusively, decided that the legal incidence of its sales tax is upon seller. *American Oil Co.*, 380 U.S. at 455-56. Any other result ignores this Court's development of legal incidence jurisprudence, improperly rejects Missouri's reasonable construction of its own sales tax law, and unjustifiably interferes with Missouri's right to raise revenues.

CONCLUSION

Petitioners urge this Court to clarify the issues presented in this case, restore the proper balance of the sovereign powers between the federal government and the states, and respectfully request this Court to grant a writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. McADAMS
Counsel of Record
ALANA M. BARRAGÁN-SCOTT
C. GAIL VASTERLING
Assistant Attorneys General

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Petitioners